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No. 82-1334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CEDAR POINT INVESTMENT CORPORATION, *et al.*,
Petitioners,

v.

CEDAR POINT APARTMENTS, LTD., a limited partnership
by John G. Ariko, its general partner,
Respondent.

and (CONSOLIDATED WITH)

B & D INVESTMENT CORPORATION, *et al.*,
Petitioners,

v.

WELLINGTON GREEN APARTMENTS, LTD., a limited partnership
and Anthony J. Nicholson, as general partner,
Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL ARGUMENT AND REASONS FOR GRANTING THE WRIT

I

Contrary To Respondents' Argument, The Court Of Appeals Exceeded The Scope Of Rule 52(a), FRCP, In That The Court In Reaching Its Various Legal Conclusions Independently Made And Relied Upon Its Own View Of The Facts.

Nowhere in their Brief in Opposition have Respondents' challenged or disputed the Petitioners' statements as to the

factual record which had been developed in the District Court. Nor have Respondents disputed or challenged in any way Petitioners' assertions as set forth in their Petition for Certiorari as to how and in what way the Court of Appeals made its own Findings of Fact both on the "ultimate" and various "subsidiary" facts. In truth and in fact Respondents have no basis to so challenge. Rather, they simply contend, without any reference to the factual statements as set forth either in Petitioners' Statement of the Case or Argument that the Court of Appeals followed the "clearly erroneous" standard of Rule 52(a) except as to matters of law which they contend are freely reviewable.

But, Petitioners respectfully submit, as was demonstrated and set out both in their Statement of the Case and in the Argument portion of their Petition, that the record as developed in the District Court was replete with numerous contradictions in the testimony and thus subject to various and different inferences which could be drawn therefrom. Rule 52(a), FRCP, clearly mandates that such inferences are for the District Court to determine and resolve; not in the first instance for the Court of Appeals. See, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (April 27, 1982); and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Rule 17 of this Court clearly provides that one of the bases for the granting of certiorari is in cases where the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision." The granting of a Writ of Certiorari is not limited, as inferred by Respondents to those cases which involve or present a conflict with the decision of another Federal Court of Appeals on the same matter. Petitioners submit that unless certiorari is granted in the instant case that they will suffer substantial and irreparable monetary injury in the possible amount of 1.2 Million Dollars ($1,200,000.00) actual damages

as claimed by Respondents together with, if awarded, punitive damages. Furthermore, Petitioners also submit that the integrity of the judicial system particularly the proper role and scope of a Federal Court of Appeals vis a vis the role, scope, and power of a Federal District Court will be impaired unless this Court's power of supervision is exercised herein.

II

Although The Issue Of Whether Respondents (Plaintiffs) Had The Requisite Standing To Sue Is Primarily A Matter Of Law, Nevertheless Such Determination Must Be Made In Light Of The Facts As Made And Determined By The Federal District Court. A Court Of Appeals Is Barred, In Reviewing And Determining Matters Of Law, From Making And Conducting Its Own Independent Review And Then Making And Determining Factual Issues Not Resolved Or Decided By The District Court As Part Of Its Findings Of Fact. In Such Instances, If Factual Determinations Have Not Been Made, The Appropriate Procedure Is To Vacate And Remand To The District Court For Such Factual Determination.

Respondents in Point II of the Argument in Opposition contend that the issue of whether they, as the purported assignees of the Purchaser, had the requisite standing to maintain suit is purely a question of law which was to be determined from the plain language of the contracts and its provisions governing assignments. Thus, they contend that the Court of Appeals, in its Opinion, only referred to the plain language of the contracts for sale, to case law and to legal treatises. Not so. A reading of pertinent portions of the Opinion from the Eighth Circuit Court of Appeals refutes this statement. For example, on page A-10 the Court stated:

> "To the contrary, other contractual provisions, ..., *as well as the circumstances surrounding the negotiation and execution* of these contracts strongly *support the inference*

> that paragraph 28, *if it was intended* to apply to an assignment of rights, *was not intended to preclude* the power to assign in violation of the restrictions." (Emphasis supplied).

Then, continuing on page A-11 of its Opinion, the Court also stated:

> "Although there was no actual writing by the assignees, *we find* that a valid and binding promise to assume the purchaser's duty *can be implied from the conduct of the assignee partnerships.*" (Emphasis supplied).

By the very language of the Opinion, the Court of Appeals has demonstrated that it was making and drawing factual inferences and conclusions from the record, which were not made or determined by the District Court. Such procedure constitutes such a departure "from the accepted and usual course of judicial proceedings" so as to necessitate review under this Court's power of supervision. See, *Pullman-Standard, supra.;* and *Zenith Radio Corp., supra.*

III

The Issue As To Whether The Acts And Conduct Of Petitioners (Sellers) Constituted A Partial Or Complete Waiver Of Respondents' Breach Is In The First Instance A Factual Matter Particularly As To Their Intent. The Court Of Appeals Erred In Conducting Its Own Independent Review Of The Evidence And Drawing And Making Different Factual Conclusions And Inferences Than Did The District Court And Thus Hold That The Critical Factual Finding By The District Court Was "Clearly Erroneous" When In Fact Such Finding By The District Court Was Supported By Competent And Express Evidence On The Record. The Court Of Appeals Further Erred In Determining The "Ultimate" Factual Issue By Also Making And Relying Upon Various "Subsidiary" Factual Determinations.

One key clearly was not in dispute throughout the litigation. Nicholson, as Purchaser, had first breached each contract for sale by failing to comply with the earnest money deposit provisions. There is also no dispute that Respondents did not comply with the assignment provision of each contract. The crucial factual issue for resolution in this litigation was whether the Sellers *intended* to totally and completely waive the Purchaser's breach who was in a declared default when he made a late tender, but still not in the form as required by the contracts, of the earnest money deposit, and the Sellers instructed DRG to continue to work toward closing, but only after express representations were made by Purchaser as to when closing would occur.

Respondents in Point III of their Argument mislead and misconstrue the record by stating that the District Court had only found that Petitioner (Ham) had instructed his agent to continue working toward a closing of the contract, and then that the Court of Appeals only *from these same facts* (Emphasis Respondents) found that the same, as a matter of law, amounted to a complete waiver of the breach. (Brief pp. 5-6). But, this factual finding (FOF ¶28) by the District Court was only

part and parcel of the remainder of its total factual finding in this regard - to-wit:

> "Sellers were induced and persuaded to proceed with the deal and convey the property to the purchaser Nicholson based upon the representations by Nicholson that closing would occur on or prior to June 14, 1979, the date the commitments to insure were scheduled to expire." (FOF ¶28). (A-39)

The Court of Appeals in its Opinion simply disregards this finding and holds that it was "clearly erroneous" by stating that there was no evidence that the Sellers ever communicated either to the Purchaser or to DRG any conditions being attached to their waiver of the breach or to their authorization to proceed toward closing. But, as set forth on pages 23 through 25 of the Petition and as shown by the pages from the transcript of evidence as attached at Appendix E to the Petition for Certiorari (A 47-55) there was, in fact, an express communication and understanding between Petitioner Ham and DRG as to when closing had to occur - which was to be no later than June 14, 1979. This understanding was reached in light of the express representations by Purchaser and his attorney that closing will occur prior to the [then] scheduled expiration of the FHA commitments to insure. (See, A 53-54, Ex. X). Thus, there was competent and substantial evidence for the District Court's Finding, contrary to the decision of the Court of Appeals.

Secondly, Respondents have again not refuted or challenged in their Brief in Opposition those portions from the Opinion in which the Court actually made both the ultimate and subsidiary factual determinations based upon its own review of the record. Thus, contrary to the Statement in their Brief, the Court of Appeals in holding that there was a complete and total waiver of the breach by the Sellers did not simply rest on the "same facts" as had been decided by the District Court. If such was the case, why did the Court of Appeals hold that DRG, the mortgage

broker, was not guilty of misconduct and had not acted tortiously? Why did the Court of Appeals state that after the contracts had fallen through that it was the Sellers who had immediately commenced renegotiation for a higher contract price and which statement of fact was directly contradictory to Petitioners' evidence of record? Why did the Court of Appeals state and hold that the Petitioners at the time the extension of the FHA commitments to insure were obtained had uncompleted contract duties, and in making such statement made specific reference in Footnote 15 to a Respondents' Exhibit which was a letter from their attorney setting forth Respondents' view of the facts? Why did the Court of Appeals recite and state that on June 12, 1979 Petitioner Ham had demanded from Respondents' attorney, David Dempsey, fifteen (15) days actual prior notice of the closing date when such statement was directly and contradictory to the testimony of Petitioner Ham as to what he had demanded and what had occurred during this conversation? (See Petition for Writ of Certiorari pp. 11-17 and 27-28).

To argue the Court of Appeals simply relied upon the same facts and that the legal significance of Sellers' act "was in truth a conclusion on a matter of law" is simply not supported by the record. Missouri law which recognizes that a party can partially or conditionally waive a breach clearly holds that inherent in such a determination is a determination of the facts and a determination as to a party's intent. See, *Nicholls* v. *Kammerich,* 626 S.W.2d 653, 656-57 (Mo. App. 1981). Moreover, this Court has long recognized that issues as to intent are primarily factual matters. See, *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979); and *Pullman, supra.*

Certiorari should be granted since the Court of Appeals by its Opinion "so far departed from the accepted and usual course of judicial proceedings" so as to necessitate review under this Court's power of supervision.

IV

The Court Of Appeals Erred In Determining In The First Instance That DRG Was Acting As Agent For Seller When It Obtained The Extension Of The FHA Commitments To Insure.

In Point IV of their Argument, Respondents correctly state that the District Court made no additional findings as to whether DRG when it obtained from FHA the extension of the commitments to insure was acting as the agent for the Sellers. But, Respondents misperceive the issue. Simply because the District Court did not make a finding on that issue does not then authorize the Court of Appeals to make its own factual determination in the first instance. Instead it has long been held by this Court that the appropriate procedure is to remand to the District Court with directions to make factual determination on issues not decided but necessary for determination. See, *DeMarco* v. *United States,* 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1074); and *InWood Laboratories* v. *Ives Laboratories,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

As demonstrated in the Petition, it would not have violated the District Court's previous Findings of Fact as to DRG initially being Sellers' agent to have found and concluded as a fact that when it requested and obtained the extension of the FHA commitments to insure that it did so as the agent for the Purchaser. The record and evidence clearly showed that when the contracts for the sale were executed that a shift in the parties relationship with DRG occurred. The Purchaser, pursuant to the terms of the contract for sale, had retained and employed DRG to be their agent for obtaining the mortgage funds and for processing in their name and on their behalf with FHA the firm commitments to insure.

CONCLUSION

Petitioners, contrary to Respondents' Argument, are not merely seeking another review of the facts and evidentiary questions peculiar to this case alone. Rather, Petitioners bring to this Court what they believe to be a case wherein the Court of Appeals, contrary to the recent teachings of this Court in *Pullman-Standard* v. *Swint, supra.*, and its subsequent progeny, has "so far departed from the accepted and usual course of judicial proceeding" so as to necessitate review under this Court's power of supervision. The proper administration of justice, the integrity of the judicial process, and the relationship as to the powers and scope of an Appellate Court vis a vis the power and scope of a Federal District Court are of such import as to warrant review. Petitioners are not simply complaining or unhappy with the Court of Appeals interpretation of the law. Rather, they submit that in this case the Court of Appeals under the guise of interpreting the law conducted its own independent review of the evidence, made its own factual inferences, viewed the record in the light most favorable to Respondents, and then made and substituted its version of both the "ultimate" and "subsidiary" facts than those from the District Court. Such constitutes a violation of Rule 52(a).

Certiorari should be granted.

Respectfully submitted,

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